

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Recommended Decision of)
Federal-State Joint Board)
on Universal Service)
)

CC Docket No. 96-45

TO: The Commission

COMMENTS OF AMERICAN PERSONAL COMMUNICATIONS

Anne V. Schelle
Vice President
American Personal
Communications
One Democracy Center
6901 Rockledge Drive
Suite 600
Bethesda, Maryland 20817
(301) 214-9200

KURT A. WIMMER
GERARD J. WALDRON
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Its Attorneys

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Introduction And Summary

In determining whether to adopt the numerous parts of the Federal-State Joint Board's Recommended Decision ("*Recommended Decision*") on universal service support policies, American Personal Communications ("APC")^{1/} urges the Commission to modify three aspects of the Joint Board's recommendation: *First*, the size of the fund recommended by the Joint Board overstates the amount that local exchange carriers must recover by including part of the cost of a telephone company's switch and local loop that should be allocated to services other than basic service. *Second*, the Commission should adopt incentives that drive down the fund to an efficient level. *Third*, fund contributions should be assessed in a manner that minimizes accounting gimmicks and maximizes fairness. Finally, the Commission should not accept the Board's finding, with no

^{1/} American PCS, L.P. d/b/a American Personal Communications ("APC") provides personal communications service ("PCS") in the Washington - Baltimore market under the brand name "Sprint Spectrum".

analysis, that the 1993 Budget Act permits states to impose universal service fees on CMRS providers. With these changes, the Commission could ensure that the goal of universal service will be achieved in a manner that is fair, efficient, and competitively neutral.

I. THE COMMISSION SHOULD ESTABLISH A FUND THAT COMPENSATES ELIGIBLE CARRIERS ONLY FOR THOSE COSTS USED TO PROVIDE UNIVERSAL SERVICE.

The Joint Board recommended that the universal service support for non-rural eligible telecommunications carriers be based on the forward-looking costs of providing the services identified by the Board as constituting a "core" universal service. *Recommended Decision* at ¶ 273. APC agrees with the recommendation that the Commission adopt a forward-looking cost methodology, since that system sends true market signals to both new entrants and incumbents about the economic costs of providing service.^{2/} However, APC urges the Commission to review carefully the recommendation to ensure that only costs directly related to provision of universal service are being included in the amount of money to be recovered from contributing carriers, and nothing more.

^{2/} A payment system that focuses on embedded costs, such as was advocated by many local exchange carriers, provides no incentives for carriers to operate more efficiently. The Joint Board correctly concluded that to encourage efficiency, support payments should be based on "the costs that would be incurred by an efficient competitor entering that market." *Recommended Decision* at ¶ 269. If the payment mechanism was based on embedded costs, then the LECs would be rewarded for expenditures made in a monopoly, rate-of-return environment.

APC's concern is that the Joint Board's recommendation overstates the amount of funds that an eligible carrier should be able to recover to support universal service. The Joint Board recommends that the proxy model ultimately adopted by the Commission should include "all of the costs of the telephone network elements that are used to provide supported services." *Id.* at 273. The Joint Board also recommends that "a reasonable allocation of joint and common costs should be assigned to the cost of supported services." *Id.* However, the Joint Board fails to give sufficient weight to the fact that the "the telephone network elements that are used to provide supported services," such as switches and all parts of the local loop, also enable local telephone companies to provide a host of enhanced services, such as call waiting, caller ID, call forwarding, call return, directory assistance, voice mailboxes, ISDN, and Internet access services. All of these services are provided using the same switches and elements of the local loop as are used to provide universal service. All of these services generate substantial non-regulated revenue for local telephone companies. Yet under the Joint Board's proposal, unless the cost of a element, such as a part of a switch, "can be separately identified as required for only specific advanced services," it will be included in the costs to be supported by the universal support mechanism. *Id.* at ¶ 274. As the Joint Board seemed to recognize, these readily identifiable costs are rare.

The "all loop costs get supported" approach recommended by the Joint Board results in a fund mechanism that greatly overstates the amount of money eligible carriers need to provide the proscribed definition of universal service. The goal of the universal support mechanism is not to maintain a local telephone company's total revenue

at a constant level, but rather to provide local telephone companies with the difference between the revenue received for providing a package of universal service and the costs of providing *such services*.^{3/} Accordingly, eligible carriers should *not* receive any support from the universal support mechanism for elements or portions of elements of the local loop that are used to provide caller ID, call forwarding, voice mailboxes, call return, Internet access service, or any other enhanced service.

Two reasons support this conclusion. (1) Enhanced services are competitive services, and a plan that subsidizes an incumbent telephone company's offering of enhanced services violates the principle of competitive neutrality. *See* 47 U.S.C. § 254(b)(4); *Recommended Decision* at ¶ 23. (2) Providing carriers with support for services not within the definition of universal service suffers the same fault as using a support mechanism based on embedded costs: Incumbents and new entrants alike will receive incorrect signals on the economic costs of providing *universal service*, and thus will make incorrect investment decisions. *See id.* at ¶ 275.

For these reasons, APC urges the Commission to adopt a rule that provides for an allocation of switching and local loop costs between costs used to provide universal service and costs used to provide other services. The allocation would be no more difficult than other allocation decisions made by the FCC, and could be based on information provided by incumbent LECs, which have access to this information.^{4/} The

^{3/} *See Recommended Decision* at ¶¶ 309-14.

^{4/} Incumbent LECs have access to this information because they are regulated at the
(continued...)

Commission could base the allocation on the revenues generated by the telecommunications carrier for use of the switch and local loop to provide universal service, on the one hand, and all other services. Or perhaps more simply, the allocation could be based on revenues generated from basic service compared to revenues generated from enhanced services. This approach would help carriers that serve certain high-cost areas in which the subscribers do not use enhanced services extensively. This approach also is easy to administer, and that should argue for its serious consideration by the Commission.

II. THE COMMISSION SHOULD ADOPT INCENTIVES THAT PUSH THE SUBSIDY NEEDED TO SUPPORT UNIVERSAL SERVICE TO AN EFFICIENT LEVEL.

APC strongly urges the Commission to adopt the Joint Board's recommendation to use a forward-looking cost methodology, since that will promote an efficient support mechanism at the beginning of the process. In addition, the Joint Board included other sensible recommendations, such as not supporting universal service for second lines to a household or lines for second homes or for advanced services such as ISDN, end-to-end digital service, or call waiting. These recommendations will lead to a more efficient and sound funding mechanism. However, the Commission must consider

^{4/}(...continued)

federal and state level. By contrast, the proposal of the Joint Board to base a support mechanism on the interstate revenues of *all* carriers, discussed *infra*, is absurd since the vast majority of carriers covered by the Joint Board's recommendation are not subject to the rules on jurisdictional separations and have no mechanism to allocate their revenues. *See id.*

additional methods to guard against the universal support subsidy growing over time. It is well recognized that the telecommunications industry is a cost-declining industry, which is an outgrowth of the deployment of fiber optics, the increased use of computers to manage the network more efficiently, and Moore's Law.^{5/} Consequently, it is reasonable to expect that the absolute cost of providing universal service should decline over time.

The Commission should take concrete steps to encourage this tendency towards lower costs. First, the Commission should continue in its effort to introduce local telephone competition, since this will have the most profound effect on the cost structure of providing universal service. (If a competing carrier offers basic telephone service for 75% of an incumbent carrier's price, then the ILEC will either lose business or address its cost structure.) Second, the Commission should consider innovative proposals, such as the use of competitive bidding, to "harness competitive forces to minimize the cost of universal service." *Recommended Decision* at ¶ 318. In that context, the Commission should take up the Joint Board's suggestion to explore further the use of competitive bidding.

Though APC is not prepared at this time to endorse a specific competitive bidding proposal, we do recommend the Commission work with the states to develop a proposal that

- is open to all prospective eligible carriers;

^{5/} Moore's Law refers to the proposition that every eighteen months to two years the cost of processing power for computers falls by fifty percent.

- is open to all carriers willing to accept Section 214(e) obligations;
- is not biased either for or against incumbents;
- is reasonably flexible in permitting bidding carriers to designate service areas other than study areas for service; and
- *is not biased against particular technologies such as wireless or fixed wireless.*

A proposal that meets these objectives holds the promise of combining marketplace forces with the goal of universal service to achieve an efficient and cost-effective method of delivering service to consumers.

III. THE COMMISSION SHOULD LOOK TO OBJECTIVE FACTORS, SUCH AS A CARRIER'S NUMBER OF LINES OR CUSTOMERS, AND NOT TO INTERSTATE OR INTRASTATE REVENUES AS A BASIS FOR SUBSIDY ASSESSMENTS.

The Joint Board recommends that universal service support mechanisms for schools and libraries be based on interstate and intrastate revenues of interstate telecommunications carriers. The Board also recommends that the Commission decide after further study whether the support mechanisms for high cost and low income assistance should be based on interstate or intrastate revenues. APC suggests that several reasons argue against using either revenue base for assessment of any of the support mechanisms.

First, the use of an interstate or intrastate revenue base opens the system to difficult interpretative questions that could be manipulated by carriers. Though this concern is present in any system, the much-heralded "convergence" of telecommunications services makes the manipulation unavoidable. If a cable company, for instance, provides a bundled package of cable service, local telephony, and PCS, all

for just a single basic price per month of \$60, how should the cable company allocate its revenue? Or if a long distance company provides DBS service to its long distance customers for \$30 per month, and local telephony at a "special introductory rate" of \$10 per month, how should its revenue be allocated? Perhaps a more straight-forward question is how should a CMRS provider allocate revenue it receives when it offers a customer a subsidized phone with a bundled service of "basic" CMRS plus voicemail and caller ID? These examples, of course, are not fanciful. Our concern is that the answer to how these costs should be allocated will be left up to "good faith" interpretation by accountants for these carriers and will be impossible to police by either federal or state regulators. The risk of accounting gimmicks to defeat an administrative fee is always present, but the ongoing convergence of companies and services adds to the slipperiness of the revenue numbers.

It is somewhat paradoxical that the convergence of previously segmented industries was one of the main reasons Congress adopted the Telecommunications Act of 1996.^{6/} And yet the Joint Board seeks to cling to neat categories of revenue, when the convergence pushed along by the 1996 Act is erasing those categories.^{7/}

^{6/} See, e.g., H.R. REP. NO. 204, 102d Cong., 1st Sess. 48 (1995).

^{7/} Curiously, the Notice of Proposed Rulemaking identified this problem when it asked for proposals on how to determine interstate revenues for the numerous companies that are not subject to jurisdictional separations rules and have no basis, nor currently any need, to identify their revenues as interstate or intrastate. *NPRM* at ¶¶ 125-26. Unfortunately, those legitimate concerns receive only small mention in the Joint Board's recommendation. See *Recommended Decision* at ¶ 822 (suggesting Commission seek information on risk of revenue manipulation).

Second, any support mechanism based on only interstate revenues would defeat the goal of competitive neutrality. As Commissioner Ness recognized in her statement: "[T]he principle of competitive neutrality should steer us away from an approach that would disproportionately burden any category of carrier (as, for example, would occur with wireless companies under an interstate-only approach)."^{8/} CMRS carriers would be burdened by an interstate-only approach because a large share of their revenue stems from interstate traffic. This fact is partially due to the service areas defined by the Commission when it established PCS: a large number of the service areas of PCS providers (MTAs and BTAs) encompass more than one state.^{9/}

Third, a support mechanism based on objective factors, such as a carrier's number of subscribers or number of lines or some other readily identifiable metric, instead of (interstate and/or intrastate) revenues would accomplish the same goal of capturing the carrier's telecommunications activity without being subject to accounting manipulation.

^{8/} Separate Statement of Commissioner Susan Ness, *Federal- State Joint Board on Universal Service Recommended Decision* (CC Docket No. 96-45) at p. 3 (Nov. 7, 1996).

^{9/} For example, the 51 recognized MTAs are based on the RAND MCNALLY COMMERCIAL ATLAS & MARKETING GUIDE, see 47 C.F.R. §§ 24.13, 90.7, and reflect the flow of commerce rather than state boundaries.

IV. THE JOINT BOARD'S CURSORY FINDING ON ABILITY OF STATES TO IMPOSE UNIVERSAL SERVICE PAYMENTS ON CMRS PROVIDERS SHOULD BE REJECTED.

The Joint Board, in a single sentence with no analysis, states that it has determined that Section 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state support mechanisms. *Recommended Decision* at ¶ 791. The Commission should reject this finding from the Joint Board as contrary to the express statutory language of the Communications Act of 1934.^{10/}

The Joint Board's finding is flawed because the Board apparently believes that states need not comply with Section 332(c)(3)(A) of the Communications Act and show that CMRS is a substitute for land line telephone exchange service for a substantial portion of the public before it can impose on CMRS providers a universal service fee.^{11/} The Joint Board seems to suggest that to give meaning to the universal service provisions of Section 254, the Commission and the states should simply gloss over and ignore the requirements of Section 332(c)(3)(A). These requirements cannot be so readily dismissed, however. Moreover, the Commission can interpret these various sections in a

^{10/} The Joint Board also recommended that the Commission include within its definition of "telecommunications carriers" providers of CMRS. *Recommended Decision* at ¶ 785. By contrast to the finding on Section 332(c)(3), the Joint Board's recommendation falls within the jurisdiction and competence of the Joint Board and is supported by some analysis. *Compare id.* at ¶ 791 *with id.* at ¶ 783-90.

^{11/} Since the Joint Board's decision contains no analysis, one can only guess at their reasoning. This lack of analysis should be reason enough to reject the finding on Section 332(c)(3).

manner that effectuates the goals of Congress that were expressed in both the Telecommunications Act of 1996 and the 1993 Budget Act.

Section 332(c)(3)(A) first provides that "no State or local government shall have any authority to regulate the entry of or the rates charged" by any CMRS provider. The subparagraph continues: "Nothing in this subparagraph shall exempt providers of commercial mobile services (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications with such state*) from requirements imposed by a State commission" to support universal service. 47 U.S.C. § 332(c)(3)(A) (emphasis added). The effect of this sentence and the limitation contained in the parenthetical is to further define the jurisdiction of states. Whereas the first sentence provides that states have no jurisdiction over CMRS rates and entry, the second sentence provides that in certain defined circumstance states may impose fees on CMRS providers.

This second sentence of Section 332 (c)(3)(A) leads to two important conclusions. *First*, Congress interpreted universal service fees not as a "term and condition," but rather as a means to regulate entry or rates. Otherwise, the sentence is unnecessary, and it is well established that all statutory language must be given meaning.^{12/} *Second*, Congress determined that when CMRS providers become a substitute for land line telephone service, then part of the jurisdiction of states should be returned -- namely, the jurisdiction to impose universal service fees. *However, this*

^{12/} *Mountain States Tel. et al. v. Pueblo of Santa Ana*, 472 US 237, 249 (1985); Sutherland, Statutory Construction § 46-06.

statutory language clearly provides that prior to that time, states have no authority to impose such a fee.

The Joint Board noted that several commenters argued that Section 254, requiring universal service contributions from all telecommunications carriers, somehow trumps Section 332(c).^{13/} But this analysis would render inoperative the clear limitations on state jurisdiction set forth in Section 332(c). Consequently, the Commission must seek to harmonize these two apparently conflicting statutory provisions in a way that achieves the fundamental purpose of both.

Section 254, read in conjunction with Section 332(c)(3)(A), enables *the Commission* to impose on CMRS providers a universal service fee, but states are not permitted to impose such a fee until a state determines that CMRS providers offer a service that is a substitute for land line telephone service for a substantial portion of the communications of the state. At that point, CMRS providers will be subject to state jurisdiction for state-imposed universal service payments, pursuant to Section 332(c)(3)(A), and will be subject to a state-imposed equitable and nondiscriminatory contribution toward universal service, pursuant to Section 254. Prior to that point, however, states lack jurisdiction to impose universal service fees on CMRS providers.

This formulation preserves both the clear language of Section 332(c)(3)(A), which denies states jurisdiction, and the mandate in Section 254 that all telecommunications providers should be subject to universal service contributions. The

^{13/} *Recommended Decision* at ¶ 783.

Commission must reject the finding of the Joint Board to simply ignore the clear statement by Congress in Section 332(c)(3)(A) that the authority of states is thereby limited.

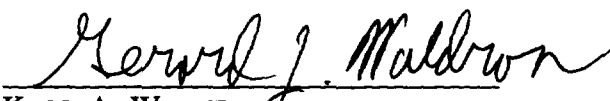
CONCLUSION

For the reasons stated above, APC urges the Commission to modify the Joint Board's recommendation in accordance with these comments.

Respectfully submitted,

AMERICAN PERSONAL
COMMUNICATIONS

Anne V. Schelle
Vice President
American Personal
Communications
One Democracy Center
6901 Rockledge Drive
Suite 600
Bethesda, Maryland 20817
(301) 214-9200


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GERARD J. WALDRON
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